Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HEATHER BURTON, AMY BURTON, THOMAS BURTON, JENNY BRANDT, MICHELLE BALIKES, AND JOHN BURTON,

Petitioners,

v.

PATRICIA RICHMOND AND MAY ANN ALLEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY E. BROTHERTON
Counsel of Record
LEGAL WRITES, LLC
1390 Boone Industrial Drive
Columbia, Missouri 65201
(573) 875-1571
Attorney for Petitioners

CHRISTOPHER A. SLUSHER
Of Counsel

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. When a state children services agency recommends that the juvenile court place six minor children with relatives and maintains supervisory control of the children's day-to-day lives and asserts custodial rights over the children, has it and its agents also acquired a duty to protect those children from being physically and sexually abused when they receive information that such abuse is taking place?

2. Would a reasonable official working for a state children services agency in 1985 have understood that once he/she removes a child from the natural parents and places that child with another person, the state had a duty to protect that child and that deliberate indifference to the child's situation deprived said child of due process?

PARTIES

The Petitioners, Heather Burton, et al., appear through Gary E. Brotherton, 1390 Boone Industrial Drive, Columbia, Missouri 65202-3381; (573) 887-1571.

The Respondents, Patricia Richmond, et al., appear through The Honorable Jeremiah Nixon, Attorney General of the State of Missouri, P.O. Box 899, Jefferson City, Missouri 65102; (573) 751-3321.

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OPINION BELOW

The United States District Court for the Western District of Missouri denied Respondents' motion for summary judgment on April 28, 2003. App. 13-35. The United States Court of Appeals, Eighth Circuit, reversed the District Court's order in Petitioner's favor in *Burton v. Richmond*, 370 F.3d 723 (8th Cir. 2004) (hereinafter "*Burton II*") on June 2, 2004, App. 1-12, and that court denied Petitioners' motion for rehearing on August 2, 2004. App. 36.

JURISDICTION

This Court has jurisdiction to review the decisions of the federal courts of appeals pursuant to 28 U.S.C. § 1254(1). Specifically those decisions which conflict with opinions of other circuits of the court of appeals and which depart from the usual course of judicial proceedings or sanction such a departure by a lower court. Rule 10(a).

RELEVANT PROVISIONS

The primary legal provision at issue is ***U.S. Const., Amend. XIV:*** "[N]or shall any state . . . deprive any person of . . . liberty. . . . "

STATEMENT

Procedural Background

Petitioners brought a civil rights action against Respondents, seeking damages for the physical, emotional

and sexual abuse they suffered while in Respondents' care and custody.

Respondents first sought to defend the action with a motion to dismiss on the basis of qualified immunity. *Burton v. Richmond,* 276 F.3d 973 (8th Cir. 2002) (hereinafter "*Burton I*"). The District Court denied that motion, and the Eighth Circuit affirmed. *Id.*

On remand, Respondents filed a motion for summary judgment on a theory of qualified immunity. *Id.* Relying in part on "the law of the case doctrine," the District Court denied the motion for summary judgment. The District Court opined that *Burton I* could only be read to mean that Respondents' duty to protect the minor children predated their placement in harm's way in 1985. App. 26-27. The Court went on to find that DFS had a "special relationship" that created an affirmative duty to protect the minor children. The District Court concluded that the minor children had established a fact question for a jury to decide.

On June 2, 2004, the Eighth Circuit reversed, holding that Respondents did not have a "special relationship" because they did not have "legal custody;" rather, Respondents merely helped the family accomplish what it had predetermined to be best for the children. *Burton II*. App. 1-12. Petitioners sought rehearing or transfer as no court had ever required "legal custody" in order for there to be a "special relationship" that required the State actors to fulfill a duty to protect and on August 2, 2004, the Eighth Circuit denied that motion. App. 36.

Statement of Facts

In January 1985, Shirley Burton took her six children – Heather, Amy, Thomas, Jenny, Michelle and John (Petitioners), to the home of Rhonda Richards, Shirley's sister. Shirley told her sister that she just could not care for her children right then and that she needed the family to pull together to help her.

Rhonda contacted her mother Jean Huffman. The two women divided the children as follows: Amy, Jenny, Heather and Thomas would go live with the Huffmans. The remaining two children – Michelle and John – would go to the Richards' home.

Rhonda contacted Patricia Richmond, a Division of Family Services (hereinafter "DFS") case worker, and explained this situation. A second DFS case worker, Mary Ann Allen, then asked the Juvenile Court of Cole County to take jurisdiction of the six minor children. Without conducting a home study or criminal background check (both conditions precedent to any placement of a child who comes before the Juvenile Court), Allen recommended that the Court place Amy, Jenny, Heather and Thomas with the Huffmans and Michelle and John with the Richards.

Allen made her recommendation without knowing that Jimmy Huffman, the husband of the children's grandmother, had served approximately twenty-six years in prison for first degree murder after robbing and shooting a man to death in front of the man's four-year-old daughter. Jimmy Huffman's parole was revoked in 1965 for molesting his fourteen-year-old niece. Jean Huffman, the children's grandmother, also served time in prison.

The Court ordered DFS to maintain day-to-day supervision of the children – e.g., the Huffmans needed DFS's approval before taking the children outside the state of Missouri or seeking any medical care for them. In its letters notifying all interested parties of reviews in the case, DFS held itself out as the children's legal custodian. At its Permanency Planning Review Team meetings, DFS evaluated "the progress of each child in agency custody" – this included the Petitioners.

In April 1985, Rhonda contacted Ms. Allen and reported that Shirley had caused a problem at a family barbeque on April 21, 1985 by accusing Jim Huffman of sexually abusing Amy. Shirley also immediately reported this to Richmond, but no one followed up on it.

Five years later, Jim Huffman pleaded guilty to sexually molesting the female Burton children who lived with the Huffmans between 1985 and 1989.

REASONS FOR GRANTING THE WRIT

1. This petition presents the important federal question of when and how is a "special relationship" formed such that a state agency and its agents acquire an affirmative duty to protect minor children.

In *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989), this Court announced that a state agency has no duty to protect individuals against private violence. *Id.* at 197. It added, however, that the state must provide protective services whenever the person has been deprived of his liberty to care for himself. *Id.* at 199.

DeShaney involved a young boy who was returned to his natural father by the state agency and was later found dead. *Id.* at 201. Finding that the state agency did not undertake any action that deprived the boy of his liberty, the Court affirmed the denial of relief. *DeShaney,* however, specifically left open the question of whether foster care could create circumstances that impose a duty to protect. This case squarely presents that question.

This Court has previously addressed two areas in which such circumstances have been found: 1) Incarceration: Prisoners may litigate their rights to adequate medical care under the Eighth Amendment; *Estelle v. Gamble*, 429 U.S. 97 (1976); and 2) Institutionalization: Using the Fourteenth Amendment, this Court extended *Estelle* to permit "mentally retarded persons involuntarily committed to state institutions" to litigate their rights to adequate care. *Youngberg v. Romeo*, 457 U.S. 307 (1982). *DeShaney* requires something analogous to an involuntary commitment before a state acquires the affirmative duty to protect private citizens.

> With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.

Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989). Thus, two years later, the Third Circuit concluded, "[W]e can consider children in foster care as analogous to the institutionalized mental patients at issue in *Youngberg." Winston v. Children and Youth Services of Delaware County*, 948 F.2d 1380, 1390 (3d Cir. 1991).

In *Andrea L. by Judith B. v. Children & Youth Servs.*, 987 F. Supp. 418, 422 (E.D. Pa.), the Court recognized the analogy between foster care and institutionalization. Andrea L, who had "an extremely strong libido," had sex with the 17-year old son of her foster parents. *Id.* at 419. Later, Andrea L. alleged that that relationship violated her rights to liberty and her substantive due process rights. *Id.* In discussing whether Andrea L. had stated a claim against the defendants, the court explained:

> It is well here to emphasize that nothing in Andrea's Complaint even suggests that her sexual congress with Ricky Moyer was abusive, coerced, or unwanted. Had such an averment been made, we of course would have considered it with the utmost gravity, and given the allegation of notice, that alone likely would have been sufficient grounds on which to decide a Rule 12(b)(6) motion against defendants.

Id. at 422.

Here, the sexual encounters that the Burton girls had to endure were abusive, coerced and unwanted. Indeed, the perpetrating foster father pleaded guilty to charges of molesting each of the Burton girls.

Here, also, Petitioners' mother did not abandon them; she left them with her sister, Rhonda Richards. It was Rhonda who effectively turned the children over to DFS. After first consulting with Jean Huffman, Rhonda and Jean divided the six children so that four stayed with Jean and her husband and the other two stayed with Rhonda and her husband.

Upon learning of this, DFS and its agents immediately assumed their "special relationship" with the Petitioners by

asking the Cole County Juvenile Court to intervene. Not having done a home study or a background check, Respondents did not know that Mr. Huffman was a convicted murderer who had also molested his niece. Without knowing why the family chose to divide the children as it had, Respondents simply asked the Court to leave the children where they were. The Court did so, but ordered DFS to maintain its "special relationship" by overseeing the day-to-day supervision of the children.

A "special relationship" does not necessarily require actual custody, though the Eighth Circuit's opinion seeks to elevate it to that standard. Even so, Missouri defines "legal custody" as "the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child. . . . " §452.375, RSMo 2000. That decision-making authority was placed squarely at Respondents' feet. They had to authorize *any* medical care for the children and *any* travel outside the state of Missouri. More telling, DFS held itself out to the community as custodians of Petitioners – it approved or denied *any* medical treatment; and, when holding its monthly review of the children in its custody, DFS included Petitioners. These facts present sufficient, affirmative limitations on the Petitioners' liberty to impose an affirmative duty to protect the children.

"[O]nce the state assumes custody of a person, it owes him a rudimentary duty of safekeeping no matter how perilous his circumstances when he was free." *K H. ex rel. Murphy v. Morgan,* 914 F.2d 846, 849 (7th Cir. 1990). In foster care, a child loses her freedom and her ability to make decisions about her own welfare. She must rely entirely upon the state to take care of her needs. As noted

above, that was certainly true here, where DFS had to approve *any* medical care for the children.

This Court should grant this writ in order to deal with the important federal question of when and how a state agency and its agents form a "special relationship" with minor children such that a duty to protect is borne.

2. This petition presents a conflict among the circuits of the court of appeals on the question of when it was "clearly established" that a state owed a duty to protect children in its care.

Had Respondents done any background check on the Huffmans, they would have learned of Jim's conviction for first-degree murder. More strikingly, they would have discovered that Jim's background also included molesting his niece. Knowing this, Respondents would not have let Petitioners be placed in the Huffman home in 1985. That says a lot for the fact that it was "clearly established" in 1985 that Respondents had a duty to protect Petitioners from such harms.

The Eighth Circuit opinion in this case solidifies a firm split among the circuits as to when the duty to protect became "clearly established." This is illustrated by the following chart.

Case	before 1985	after 1985
Doe v. N.Y.C.[1] (2d Cir. 1981)	In the 1970's	
Taylor[2] (11th Cir. 1987)	By 1982	

[1] *Doe v. New York City Dept. of Soc. Servs.*, 649 F.2d 134, 141 (2nd Cir. 1981).

[2] *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987).

Yvonne L[3] (10th Cir. 1992)	By 1985	
Norfleet[4] (8th Cir. 1991)	Relies on pre-1985 cases, but . . .	
This Case: *Burton*[5] (8th Cir. 2004)		. . . not in 1985
K.H.[6] (7th Cir. 1990)		By 1986, but . . .
Doe v. Bobbitt,[7] (7th Cir. 1989)		. . . not in 1984
White[8] (4th Cir. 1983)		Not until 1992

While the Seventh Circuit wavered slightly in holding that the right was not "clearly established" in 1984 that it was in 1986, its wavering does not tip the scale against Petitioners' claim that the duty to protect them was "clearly established" in 1985.

Indeed, until *Burton II,* the Eighth Circuit seemed to agree that the duty had been "clearly established" by 1985. All of the cases relied upon in its 1991 *Norfleet* opinion predated 1985.[9] It is this case that has joined the Fourth Circuit to create a very real split among the circuits.

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[3] *Yvonne L ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992).

[4] *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289 (8th Cir. 1993).

[5] *Burton v. Richmond*, 370 F.3d 723, 730 (8th Cir. 2004).

[6] *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990).

[7] *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir. 1990).

[8] *White ex rel. White v. Chambliss*, 112 F.3d 731, 738 (4th Cir. 1997).

[9] Namely, *Doe v. New York City, supra* (finding that the duty to protect was "clearly established" in the 1970's).

There should not be multiple demarcations on a timeline all identifying the same event. The duty of state agents to protect children in their custody was either "clearly established" or it wasn't. This Court should grant this writ in order to resolve this conflict in the circuit courts of appeal and provide a bright line rule for all lower courts to apply. As things stand, whether one can state a cause of action depends largely on which circuit one finds herself. That should never be the case.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

GARY E. BROTHERTON
Counsel of Record
LEGAL WRITES, LLC
1390 Boone Industrial Drive
Columbia, Missouri 65201
(573) 875-1571
Attorney for Petitioners

CHRISTOPHER A. SLUSHER
Of Counsel

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-2487

Heather Burton; Amy Burton; Thomas Burton; Jenny Brandt; Michelle Balikes; John Burton,	*	
Plaintiffs-Appellees,	*	
v.	*	
Patricia Richmond,	*	Appeal from the United States District Court for the Western District of Missouri.
Defendant-Appellant,	*	
Jeanie Heskett,	*	
Defendant,	*	
Mary Ann Barnes, formerly known as Mary Ann Allen,	*	
Defendant-Appellant,	*	
Susan Wilfong; David Gaddie; Leann Haslag,	*	
Defendant.	*	

Submitted: January 12, 2004

Filed: June 2, 2004

Before LOKEN, Chief Judge, FAGG and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Defendants Patricia Richmond and Mary Ann Allen appeal from the District Court's denial of their motion for summary judgment on grounds of qualified immunity. Because we determine that there was no violation of a clearly established constitutional right, defendants are entitled to qualified immunity. We reverse and remand the case to the District Court and direct the entry of judgment in favor of defendants.

I.

In January 1985, plaintiffs' mother, Shirley Burton, left them with their aunt, Rhonda Richards. Rhonda and her mother, Jean Huffman, agreed that four of the children – Amy, Jenny, Heather and Thomas – would move in with Jean and her husband, Jim Huffman, while Michelle and John would remain with Rhonda until the end of the school year.[1] After working out the details of this arrangement, Rhonda contacted Richmond, a social worker at the Missouri Division of Family Services ("DFS"). Rhonda asked for Richmond's assistance because the family wanted to prevent Shirley from returning and taking plaintiffs back to live with her. To this end, Allen, another DFS caseworker, informed a juvenile officer of the arrangement worked out by Rhonda and Jean, and the officer recommended to the Cole County Circuit Court that it place the children with Rhonda and Jean as per their arrangement. The court then entered an order giving

[1] Because two of the plaintiffs had different last names at different times, we follow the lead of the District Court and refer to plaintiffs and members of their family by their first names.

physical custody of the children to Rhonda and Jean and requiring continuing supervision of the placement by DFS. The court retained legal custody, so the children remained wards of the court, even after the court-ordered placement with their relatives. In accordance with Rhonda and Jean's initial agreement, the court later ordered the transfer of physical custody of Michelle and John from Rhonda to Jean at the end of the school year. Neither Allen nor Richmond conducted a home study or criminal background check of either home before the court-ordered placement.[2]

Despite having abandoned them at Rhonda's two months earlier without any provision for their care, by March 1985 Shirley was attempting to regain custody of plaintiffs. Shirley called Richmond, shortly after the court-ordered placement in 1985 and informed her that Amy had complained that someone was "hurting her down there." Richmond did not investigate this complaint further. In April 1985, Rhonda informed Allen that Shirley had shown up at a family barbeque and accused Jim Huffman of sexually abusing Amy. Shirley met with Allen the following day, yet did not tell Allen of her suspicions. Allen took no action in response to Rhonda's report of Shirley's allegation of sexual abuse. In November 1989, the children were removed from the Huffman home after another of

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[2] Approximately seven or eight years earlier, DFS took Michelle and Jenny into custody because of suspected physical abuse by Shirley's husband. They were placed with the Huffmans by court order. DFS officials conducted a home study and criminal background check prior to this placement. This investigation revealed that Jim Huffman had been convicted of murder and had once had his parole revoked. Nonetheless, his parole officer vouched for him and informed DFS officials that Jim could provide a good home for the children. In 1978, the court returned custody of the children to Shirley and her husband.

Shirley's sisters, Saundra Oldham, called a hotline and reported her suspicions of sexual abuse. The children were immediately removed from the Huffmans's care. Jim Huffman pleaded guilty in May 1990 to sexually abusing the female children.

Plaintiffs brought suit against six DFS workers under 42 U.S.C. § 1983 (2000), claiming that their failure to conduct a background check prior to the placement and their failure to act promptly to remove them from the Huffmans' care despite receiving two allegations of sexual abuse, one reported directly by Shirley and the other starting with her but reported by Rhonda, violated their substantive due process rights under the Fourteenth Amendment. Before discovery in this case, the District Court denied defendants' motion to dismiss the complaint on grounds of qualified immunity, a decision which this Court upheld. *Burton v. Richmond*, 276 F.3d 973 (8th Cir. 2002) (hereinafter "*Burton I*"). After discovery, defendants moved for summary judgment on the basis of qualified immunity. The District Court granted summary judgment to four defendants on this basis, but determined that Allen and Richmond were not entitled to qualified immunity. Although this Court generally does not have jurisdiction to hear appeals from the denial of motions for summary judgment, an order denying summary judgment on the grounds of qualified immunity is immediately appealable under the interlocutory appeal doctrine. *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996); *Hawkins v. Holloway*, 316 F.3d 777, 781 (8th Cir. 2003).

II.

Governmental officials are entitled to qualified immunity under § 1983 when performing discretionary functions unless they violate clearly established law in executing their duties. *Burton I,* 276 F.3d at 976. In examining a claim for qualified immunity, the court must first determine whether a defendant's actions violate a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Only after a constitutional violation has been shown does the court then determine whether the right at issue was clearly established at the time of the violation. *Id.* Plaintiffs argue that defendants' failure to conduct a background check prior to the court-ordered placement with the Huffmans and their failure to remove plaintiffs from the Huffman home despite receiving two reports of sexual abuse by Jim Huffman violated their substantive due process right to bodily integrity.

The state does not have a general duty to protect individuals from harm at the hands of private actors. *DeShaney v. Winnebago County Soc. Servs. Dep't,* 489 U.S. 189, 197 (1989). A substantive due process right to protection can arise under two theories. Under the first theory, the state may owe a duty to protect individuals in its custody. *Gregory v. City of Rogers,* 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied,* 507 U.S. 913 (1993). Under the second, the state may owe a duty to protect individuals if it created the danger to which they become subject. *Id.; see also S.S. v. McMullen,* 225 F.3d 960, 962 (8th Cir. 2000) (en banc) ("[I]f the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his or her state of mind, may have committed a constitutional tort."), *cert. denied,* 532 U.S. 904 (2001). Plaintiffs

argue that they were owed a duty by defendants, employees of DFS, under both theories.

As to custody, the summary-judgment record shows that the Cole County Circuit Court placed plaintiffs with the Huffmans and DFS was directed to exercise continuing supervision over the court-ordered placement, but the court retained legal custody of the children. (Dist. Ct. Order 15). Furthermore, DFS did not have physical custody of these plaintiffs before the court-ordered placement.[3] Plaintiffs' mother initially placed them with Rhonda who agreed to keep physical custody of two of them and Jean agreed to take custody of the other four. It was only after the family made these custodial arrangements that they contacted defendants and involved the juvenile court. In effect, the family made their own custodial determinations and then went to the court in order to get them legally sanctioned. Defendants merely assisted a family to obtain the protection of the state court in order to prevent an unstable mother from demanding the return of her children.[4]

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[3] Although DFS had previously taken two of the plaintiffs into the agency's custody prior to the 1977 placement with the Huffmans, legal and physical custody had been returned to Shirley before the 1985 placement.

[4] Shirley had difficulty coping with her duties as a mother. In January 1977, Michelle and Jenny were placed in foster care after Rhonda reported possible physical abuse in the Burton home. Ultimately, the children were placed in the Huffman home, but in August 1978, custody was returned to Shirley. In 1981, Shirley's children were again taken into DFS custody for a few days. In late 1984, the juvenile court opened a protective services case for plaintiffs because Shirley had failed to ensure that they all received their necessary immunizations. In late November 1984, Allen investigated Shirley after receiving a report of abuse and neglect.

The District Court determined DFS had a duty to protect plaintiffs because there was "a special custodial relationship . . . created by the state." *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993). The District Court felt bound to apply *Norfleet* in light of this Court's earlier decision in this case, which the District Court believed established as the law of the case that there was such a special custodial relationship between plaintiffs and DFS. (Dist. Ct. Order 15). This was error. Our earlier decision in this case dealt only with the allegations made by plaintiffs in their complaint. In the complaint, plaintiffs "alleged facts demonstrat[ing] a custodial situation," *Burton I*, 276 F.3d at 979, but such facts are not supported by the record developed by discovery and before the District Court at the summary-judgment stage of the proceedings. Thus, the District Court was free to reassess whether plaintiffs had adequately shown the existence of a special custodial relationship creating a duty to protect. *Cf. McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) (noting that an appellate court's earlier "holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery"). Indeed, the District Court determined there was no evidence to show that plaintiffs were in the legal custody of DFS at the time of the sexual abuse in the present case.[5] (Dist. Ct.

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[5] Subsequent to oral argument, plaintiffs supplemented the record and provided this Court with an order from the Cole County Circuit Court that referred to plaintiffs as within the legal custody of DFS. This order is dated August 1, 1989, more than four years after the complained-of conduct, thus is not evidence that plaintiffs were in the legal custody of DFS in 1985. We refuse to presume the existence of legal custody from a single court order that merely references DFS as having legal custody of plaintiffs four years after the relevant time period.

Order 15). Nevertheless, the District Court proceeded on the assumption, incorrectly derived from *Burton I,* that the county court's order requiring DFS to maintain supervision over the placement with the Huffmans created an ongoing duty for the agency to protect plaintiffs under the Due Process Clause. We disagree with that view of the law and hold that *DeShaney*-type liability can only be imposed "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *DeShaney,* 489 U.S. at 200. Here, DFS never had custody of the plaintiffs, nor can it fairly be said that DFS had control of them. *Cf. Terry B. v. Gilkey,* 229 F.3d 680, 682 (8th Cir. 2000) (refusing to find a duty to protect arising from a probate court's order requiring the Arkansas Department of Human Services to " 'maintain an open Protective Services case on these minor child[ren] for future assistance and services that are deemed necessary' ").

Nor did defendants have a duty to protect plaintiffs under the state-created danger theory. The danger in this case – the placement in the Huffman home – was created by Rhonda and Jean's agreement as to the best custodial arrangement for the family. Neither DFS nor the individual defendants took an active role in creating this placement; they merely helped the family get recognition from the juvenile court of the changed custodial arrangement. The placement was made by the court upon recommendation from the juvenile officer and did not result directly from any action taken by either appellant. Recommending to the juvenile officer the placement agreed to by the plaintiffs' aunt and grandmother was not sufficient to create a duty to protect the children while in the placement. *Cf. Milburn ex rel Milburn v. Anne Arundel County*

Dep't of Soc. Servs., 871 F.2d 474, 476 (4th Cir.) (refusing to find a duty to protect arising from the state's placement of a child in a foster home when the parents voluntarily placed the child in the home), *cert. denied*, 493 U.S. 850 (1989).

Even assuming arguendo that defendants had a duty to protect plaintiffs from harm at the hands of Jim Huffman, plaintiffs have nonetheless failed to provide sufficient evidence of a substantive due process violation by the defendants. Before official conduct or inaction rises to the level of a substantive due process violation it must be so egregious or outrageous that it is conscience-shocking. *County of Sacramento v. Lewis*, 523 U.S. 833, 848 n.8 (1998) ("[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental official is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."); *Hawkins*, 316 F.3d at 780. The conduct at issue in this case consists in part of defendants' failure to respond to two reports of sexual abuse and Allen's failure to conduct a background check of the Huffmans prior to the placement of plaintiffs with them. Each defendant received only a single and isolated complaint of possible sexual abuse in the Huffman home. The complaints were made by Shirley, the mother who previously had abandoned plaintiffs and who was attempting to reassert her parental rights. In these circumstances, defendants' failure to investigate is not so outrageous or egregious as to shock the conscience and thus the failure to investigate did not violate plaintiffs' substantive due process rights. *Cf. DeAnzona v. City and County of Denver*, 222 F.3d 1229, 1235 (10th Cir. 2000) ("Even knowingly permitting unreasonable risks to

continue does not necessarily rise to the level of conscience-shocking.").

Similarly, Allen's failure to conduct a home study prior to the court-ordered placement did not violate plaintiffs' substantive due process rights. The juvenile court never ordered DFS to conduct such a study prior to placing the children in the custody of Rhonda and Jean as requested by the family. In light of the prior successful placement of certain plaintiffs with the Huffmans in 1977, the failure to conduct a home study and background check rises at most to the level of negligence, which is not sufficient to constitute a violation of substantive due process rights. *Lewis,* 523 U.S. at 849 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). The 1977 check had revealed Jim Huffman's prior conviction and parole revocation, yet the same juvenile officer who recommended the 1977 placement with the Huffmans further recommended the 1985 placement with them. In addition, the same Cole County Circuit Court judge oversaw both placements. Furthermore, there was no allegation of sexual abuse or mistreatment during the 1977 placement. Any failure on Allen's part to conduct a home study prior to the 1985 placement does not shock the judicial conscience. *Cf. Nicini v. Morra,* 212 F.3d 798, 814 (3d Cir. 2000) (en banc) (refusing to hold that a social worker's failure to conduct a more thorough criminal background check than that required by agency policy was conscience-shocking deliberate indifference).

Because there was no duty to protect and, even if there was such a duty, because defendants' actions were not conscience-shocking, the District Court erred in concluding that plaintiffs' constitutional rights were

violated by defendants' conduct. Richmond and Allen are entitled to qualified immunity because plaintiffs have failed to show a constitutional violation.

III.

Assuming arguendo that plaintiffs have shown a constitutional violation, defendants are still entitled to qualified immunity if the alleged right at issue was not clearly established at the time of the complained-of conduct in 1985. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). We believe the constitutional right of children under DFS supervision, yet not within DFS custody, to be free from abuse in a court-ordered placement was not clearly established in 1985. Courts have split on whether children in the mid-1980s had a clearly established right to reasonable safety while placed in foster care after having been taken into state custody. *Compare Yvonne L. ex rel Lewis v. N.M. Dep't of Human Servs.,* 959 F.2d 883, 893 (10th Cir. 1992) (right clearly established as of 1985); *K.H. ex rel Murphy v. Morgan,* 914 F.2d 846, 849 (7th Cir. 1990) (right clearly established in 1986); *Taylor ex rel Walker v. Ledbetter,* 818 F.2d 791, 797 (11th Cir. 1987) (recognizing right protected child injured in 1982), *cert. denied,* 489 U.S. 1065 (1989); *Doe v. New York City Dep't of Soc. Servs.,* 649 F.2d 134, 141 (2d Cir. 1981) (recognizing right protected child injured during 1970s), *cert. denied,* 464 U.S. 864 (1983); *with White ex rel White v. Chambliss,* 112 F.3d 731, 738 (4th Cir. 1997) (right not clearly established in 1992); *Eugene D. ex rel Olivia D. v. Karman,* 889 F.2d 701, 711 (6th Cir. 1989) (right not clearly established in 1982), *cert. denied,* 496 U.S. 931 (1990); *Doe v. Bobbitt,* 881 F.2d 510, 511 (7th Cir. 1989) (right not clearly established in 1984), *cert. denied,* 495 U.S. 956 (1990). This

Court did not find such a duty until 1993. *Norfleet,* 989 F.2d at 293. Given the wide divergence of views on whether the right to protection from abuse was clearly established for children in state custody placed in foster care, we refuse to find that a right to protection while under state supervision, yet not in state custody, was clearly established in 1985. The District Court erred when it ruled that in 1985 plaintiffs had a clearly established constitutional right to be protected from abuse at the hands of a private individual while under state supervision yet not in state custody.

IV.

It is regrettable that plaintiffs suffered sexual abuse at the hands of their step-grandfather. But for the reasons stated, their attempts to assert constitutional claims for damages against Allen and Richmond cannot succeed. The order of the District Court is reversed and the case is remanded for the entry of summary judgment in favor of Allen and Richmond on the basis of qualified immunity.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

HEATHER BURTON, et al.,	)	
	)	
Plaintiffs,	)	Case No. 00-4121-CV-C-5
v.	)	
PATRICIA RICHMOND, et al.,	)	
	)	
Defendants.	)	

ORDER

Pending before the Court is the Defendants' Motion for Summary Judgment [Doc. # 72]. For the reasons stated below, the Defendants' Motion will be granted in part and denied in part.

I. Summary Judgment Standard

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving

party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prod. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted). The main purpose of a motion for summary judgment is to identify factually unsupported claims. If a plaintiff has the burden of proof at trial on a claim and the defendant has filed a motion for summary judgment, the plaintiff must identify admissible evidence sufficient to make a submissible case at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the plaintiff cannot identify such facts, the defendant is entitled to judgment as a matter of law. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322)).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 248.

II. Factual Background

Solely for the purpose of the Defendants' Summary Judgment Motion, the Court views the facts in a light most favorable to the Plaintiffs, accepting as true the Plaintiffs' version of the facts when they are disputed.

A. The Parties

The Plaintiffs, Michelle Balikes, Jenny Brandt, Thomas Burton, Heather Burton, Amy Burton, and John

Burton,[1] are all natural children of Shirley Button[2]. The Defendants, Patricia Richmond, Mary Ann Allen (Barnes), Susan Wilfong, David Gaddie, Jeannie Heskett, and Lee Ann Haslag, were at various times social workers of the Missouri Department of Social Services, Division of Family Services ("DFS") of Cole County and Warren County. Three of the Defendants worked at the Cole County DFS Office. Defendant Haslag started work with the Cole County office in 1988 and remained for two years. (Def. Ex. A, Haslag at 7.) Defendant Richmond began with the Cole County DFS office in 1971 and remained through all of the events relevant to this case. (Def. Ex. B, Richmond Dep. at. 6.) Defendant Allen began with the Cole County DFS office in 1984 and remained until 1987. (Def. Ex. C, Allen Dep. at 5-6.)[3] The other three Defendants worked in the Warren Comity DFS Office. Defendant Wilfong began with the Warren County DFS office in May of 1988. (Def. Ex. D, Wilfong Dep. at 9.) Defendant Gaddie began with Warren County DFS office in 1980 and remained until 1987. (Def. Ex. E, Gaddie Dep. at 7, 10.) Defendant Heskett was employed by the Cole County DFS from 1986 to 1990. (Def. Ex. F, Heskett Dep. at 12.)

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[1] Following the lead of the parties and DFS records, the Court, when referring to the children individually, will refer to the children by their first name because two of the children have had different last names at different times.

[2] Shirley Burton has gone by several different names in the course of her involvement with the juvenile court system and DFS. For clarity, in this Order, the mother will be referred to as Shirley Burton, again following the system set by the parties.

[3] Defendant Allen is now known as Mary Ann Barnes. The Court will refer to her as Allen, her name at the time of the incident and the name used on the relevant DFS records.

B. 1985 Juvenile Proceedings[4]

In January of 1985, Shirley Burton left all six of the Burton children in the care of her sister, Rhonda Richards ("Richards"). According to Richards, Shirley Burton left the children at her home with no clothes or provisions for their care, such as food. (Def. Ex. M, DFS Rec. at 814.) Shortly after leaving her children with Richards, Shirley Burton was arrested and jailed. (Ex. M, DFS Rec. at 815.)

In January of 1985, Amy, Jenny, Heather, and Thomas went to live with the Huffmans, and Michelle and John remained with Richards. (Ex. J, Richards Aff. ¶ 10.) Michelle and John remained in Richards' home until after school was out in 1985, and they went to live with the Huffmans in August or September of 1985. (Def. Ex. J, Richards Aff. ¶ 8.)

After the first four children went to live with the Huffmans, Richards called Defendant Richmond at the Cole County DFS office. (Def. Ex. M, DFS Rec. at 221, 814; Def. Ex. J, Richards Aff. ¶ 11.) Richards informed Defendant Richmond that Shirley Burton had left the children with Richards and the Huffmans. (Def. Ex. M, DFS Rec. at 221, 814.) The relatives ultimately requested DFS to intervene to initiate court action so that Burton could not return and take control of the Plaintiffs. (Def. Ex. M, DFS Rec. at 221, 814; Def. Ex. J, Richards Aff. ¶ 12; Pl. Ex. C. Allen Dep. at 37, lines 2-21.)

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[4] The Plaintiffs were removed from the custody of their parents once before 1985 and then returned, but the primary facts relevant to this dispute occurred in 1985 and thereafter.

On January 15, 1985, Defendant Allen notified the juvenile officer of the circumstances of the children, and recommended that the court take jurisdiction of the children, placing them in the homes of the Huffmans and Richards with DFS supervision. (Def. Ex. M, DFS Rec. at 221.) A home study was not conducted even though a home study under these circumstances was required (Pl. Ex. N); nor was a criminal background check done. Huffman's criminal record would have revealed that he had been convicted of first degree murder, had spent 26 years in prison and his subsequent parole was revoked. The State's parole revocation documents state that Huffman was extremely jealous and had a vicious temper. He threatened the life of his girlfriend on several occasions. On one occasion, he took her to a deserted area and told her that "he had a loaded shotgun in the car, which he did, and that he was going to kill her and himself." He did this to "help her mend her ways and become a better citizen." (Pl. Ex. B, Parole Violation Report at 18, 21). On at least one occasion, Huffman ripped a rival's trousers with a knife and then beat up his girlfriend for going to a motel with the rival. Huffman also admitted to having sex with his niece while she was staying in his home. She was fifteen (15), extremely immature looking and barely able to read or write. (Pl. Ex. B, Parole Violate Report at 19).

On January 16, 1985, juvenile officer Prenger filed a motion with the juvenile court to place the children with the Huffmans and Richards. The juvenile court granted an order to this effect on January 17, 1985. (Def. Ex. M, DFS Rec. at 958-59.) The order states, "IT IS DETERMINED by the Judge of the Juvenile Court that the above-named children be made Wards of this Court and that Michelle and John Burton be placed with Mrs. Rhonda Richards

and that Heather, Thomas, Jenny and Amy Burton be placed with Mr. & Mrs. Jim Huffman, with supervision provided by the Division of Family Services." (Def. Ex. M, DFS Rec. at 958 (emphasis in original).)

On August 26, 1985, juvenile officer Mike Prenger requested the juvenile court place Michelle and John in the custody of the Huffmans. (Def. Ex. M, DFS Rec. at 1913.) The court entered an order on August 30, 1985. (Def. Ex. M, DFS Rec. at 1913.) The order states, "IT IS DETERMINED by the Judge of the Juvenile Court that Michelle and John Burton remain Wards of the Court and be placed in the custody of their maternal grandparents, Mr. and Mrs. Jim Huffman, of Route 3, Box 254, Marthasville, Missouri with protective services provided by the Warren County Division of Family Services." (Def. Ex. M, DFS Rec. at 1913 (emphasis in original).)

The juvenile court did not order a home study or background check before entering its orders, and neither Allen or Richmond did a home study or criminal background check before recommending placement with the Huffmans. (Def. Ex. M, DFS Rec. at 958-59, 1913.) No Defendant was aware of any sexually inappropriate behavior of Jim Huffman toward any Plaintiff prior to the Burton children being made wards of the Cole County Juvenile Court in 1985. (Def. Ex. I, Richmond Aff. ¶ 19.)

There are two allegations of direct reports to DFS of Huffman's sexual abuse of the Plaintiffs. First, Shirley Burton called Defendant Richmond (Def. Ex. H, Harrison

(Burton) Dep.),[5] and told her that Amy told Burton that "someone was hurting me down there." (Def. Ex. H, Harrison Dep.) Shirley Burton did not follow up on her complaint (Def. Ex. H, Harrison Dep.), and Richmond did not investigate the allegation of abuse.

Second, in the DFS file, there are notes which state that Richards called Allen to report a problem the family had with Shirley Burton at a family barbeque on April 21, 1985. (Pl. Ex. P, DFS Rec. at 418.) The event was going fine until Shirley Burton became upset and accused Jim Huffman of sexually abusing Amy. (Pl. Ex. P, DFS Rec. at 418.) Richards states that everyone became upset with Shirley Burton and Shirley Burton left soon after. (Pl. Ex. P, DFS Rec. at 418.) The caseworker met with Shirley Burton the day after Richards had called DFS, and Shirley Burton did not mention Amy's statement about sexual abuse (Pl. Ex. P., DFS Rec. at 418); nor did Allen ask any questions about Amy's statement.

Other than these two reports concerning sexual abuse by Jim Huffman, there is no evidence in the record that the Plaintiffs told anyone of any physical or sexual abuse by Huffman prior to 1989. They testified that they were too afraid of Huffman to further report his conduct.

On January 26, 1989, Haslag informed Wilfong of Huffman's criminal record. The issue came up because DFS was wanting to license the Huffmans as foster parents so that they could get more money. "Additional

[5] The page numbers for Shirley Burton's deposition transcript are illegible; therefore, the Court will not refer to page numbers when referring to this deposition.

custody rights for the Huffmans was a financial consideration, and according to standard practice, DFS workers assisted with exploring such resources." (Def. Suggestions in Support of Summary Judgment at 20.) A home study is a normal part of foster care licensing process. (*Id.* at 21.) Huffman objected to the home study. No home study was done. At the time that Huffman objected to the home study, Wilfong and Haslag knew of Huffman's criminal background.

On November 20, 1989, the Plaintiffs were removed from the Huffman home following a hotline report concerning abuse from Saundra Oldham, Shirley Burton's sister, who lived in Tennessee. The Plaintiffs were immediately removed and the allegations investigated.

On November 21, 1989, the Plaintiffs' cousin, Susan Kay Hope, wrote a statement that she was sexually abused by Jim Huffman when she was about 10 years old. (Pl. Ex. O.) Immediately after the assault, Susan went to the back room and told her grandmother, Jean Huffman. Jean Huffman did not believe Susan and berated her for being "ungrateful" and "bad." (Pl. Ex. O.) Susan ignored Jim Huffman after the assault, never looked him in the eye and never was alone with him (Pl. Ex. O), but Susan never told anyone about his abuse until the Plaintiffs were removed from the Huffman home. (Pl. Ex. O.) Susan then told her mother. (Pl. Ex. O.)

On May 16, 1990, Jim Huffman pled guilty to sexually molesting the female Burton children, Michelle, Jenny, Amy, and Heather, during the time they lived in his house from 1985-1989. (Def. Ex. O.)

III. Discussion

The Plaintiffs' Complaint includes two Counts. The first count alleges that the Defendants violated the Plaintiffs' substantive due process right to bodily integrity. The second count asserts that the Defendants violated the Plaintiffs' procedural due process rights by depriving them of their mother without a hearing. The Defendants filed a motion to dismiss based on qualified immunity, which this Court denied [Doc. # 17]. The Defendants appealed that Order, and the Eighth Circuit affirmed the decision [Doc. # 25].

Now that the record has been assembled, the Defendants again assert that they are entitled to qualified immunity on both counts. Plaintiffs, however, appear to have abandoned their due process claim because they provided no evidentiary support for it. Therefore, the Court will only address Plaintiffs' substantive due process claim.

Qualified immunity "shields government officials from suit unless their conduct violated a clearly established statutory or constitutional right of which a reasonable person would have known." *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Supreme Court has directed courts to conduct a two-part inquiry in ruling on the issue of qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). The Court must first consider whether, taken in the light most favorable to the party asserting the injury, the facts alleged show that the public official's action violated a constitutional right. *Id.* at 201. Assuming that a constitutional right was violated, the second step of the inquiry is to determine whether the right was clearly

established at the time of the violation. The relevant question is whether it would have been clear to a reasonable official at the time of the violation that his action violated the right. *Id.* at 201-02. It is not necessary to show that "the very action in question has previously been held unlawful," but "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citations omitted). The qualified immunity defense ordinarily fails where the law claimed to have been violated was clearly established, because "a reasonably competent public official should know the law governing his conduct." *Phillips v. Collings*, 256 F.3d 843, 850 (8th Cir. 2001) (quoting *Harlow*, 457 U.S. at 818-19).

The Court will analyze the Defendant's assertion of qualified immunity under this two-step inquiry.

A. Step One: Is There Evidence of a Constitutional Violation?

Substantive due process is violated if the state government exercises its power arbitrarily without any reasonable justification considering the state's legitimate governmental objective. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). To rise to the level of a substantive due process violation, an abuse of power must "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126 (1992) (stating that in order to prevail on their substantive due process claim, plaintiffs must demonstrate that the state acted in a manner that "shock[s] the conscience"). The United States Supreme Court has

repeatedly emphasized that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). The constitution is not a "font of tort law." *County of Sacramento v. Lewis*, 523 U.S. at 847 n. 8. Negligence alone is not enough to state a substantive due process claim. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

While it is clear that negligence is not the appropriate standard in this case, the Court is unclear about what standard does apply. In *Sacramento*, the U.S. Supreme Court stated that something less than intentional wrongdoing would state a substantive due process claim but was unclear whether recklessness or gross negligence could ever be the appropriate standard. *See County of Sacramento*, 523 U.S. at 848. At least one court has held that "[o]nce the state acts to disturb the current custodial situation and assumes control over a child's life, the state may not create a dangerous condition for the child by knowingly or recklessly turning control of the child over to an abusive person. . . . " *Currier v. Doran*, 23 F.Supp.2d 1277, 1281 (D. N.M. 1988), *rev'd in part on other grounds*, 242 F.3d 905 (10th Cir. 2001). At the circuit level there is a split concerning the standard of liability applicable to social workers in these cases. *See Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 141 (2nd Cir. 1981); and *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (both holding the deliberate indifference standard applicable). *Compare to Yvonne L. By and Through Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 891 (10th Cir. 1992), and *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) (holding that

" . . . liability may [be] imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

At a minimum, the Court assumes that the deliberate indifference standard applicable to prisoners would apply because it would make no sense to give prisoners greater protection than that given to minor children. While the state has more day to day supervision of prisoners, children are substantially more vulnerable and punishment is not one of the goals of the child welfare system. Thus, for purposes of this motion for summary judgment, the Court assumes that the standard to be applied to the facts in this case is the deliberate indifference standard. A social worker will be held liable only if they know of and disregard a substantial risk to a child's health and safety. *See Krein v. Norris*, 309 F.3d 487 (8th Cir. 2002) (discussing the deliberate indifference standard in context of prisoner litigation), and *See Riley v. Olk-Long*, 282 F.3d 592 (8th Cir. 2002) ("An Eighth Amendment claim for failure to protect is comprised of two elements. First, an 'inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.' Second, the inmate must establish that the defendant prison official recklessly disregarded that risk." *Id.* at 595 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). To demonstrate deliberate indifference in a foster care case,[6] the plaintiff

[6] The Court uses the term foster care generically to describe families who care for someone else's children pursuant to authority delegated by the state.

must show that defendants objectively knew of, but disregarded, a risk of serious harm to the child. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999). "Plaintiffs must demonstrate that a reasonable social worker given the knowledge possessed by each defendant social worker would have perceived a risk of serious harm. . . . " *Hernandez v. Texas Dep't of Protective and Regulatory Services*, 2002 WL 31689710 (N.D. Tex. 2002). Thus, Plaintiffs must prove that they were placed in a home that posed a substantial risk of harm to the [sic] them, and the Defendants recklessly disregarded that risk.

1. Threshold Requirement – Obligation to Protect

Social workers, however, are not always liable when they are deliberately indifferent to a child's welfare. Before a state has a duty to protect its children, it must have placed the children in a more dangerous position than they would have been but for the state's actions. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). This threshold requirement was not met in *DeShaney* because the state did not place the child in the custody of his father, it merely failed to remove the child from the father. On the other hand, in *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993), the state was liable for the death of a child because it had placed the child in a foster home and did not provide the medication that was needed to control the child's asthma. In *Norfleet*, unlike *DeShaney*, the social service agency took control of the child and, therefore, assumed an affirmative obligation to protect the child.

In the earlier appeal of this case, the Eighth Circuit held that Defendants are not entitled to qualified immunity on Plaintiffs' substantive due process claim because *Norfleet* controls, not *DeShaney* or *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000). Because Plaintiffs were removed from their mother's custody, the state had an affirmative obligation to protect the Plaintiffs. *Burton v. Richards*, 276 F.3d 973, 979 (8th Cir. 2002).

Defendants, in their Motion for Summary Judgment, however, now seek to show that DFS never had *legal* custody of the children, and therefore had no obligation to protect the Plaintiffs. Defendants correctly point out that some of the children were already in the home of the Huffmans when DFS intervened, and it was Judge Kinder, not DFS, that gave custody to the Huffmans. Defendants, therefore, seek to revisit the question of whether the state placed the Plaintiffs in a more dangerous position than they would have been but for the state's actions. Defendants are effectively trying to draw a distinction between relative placement and licensed foster care placement and between cases where DFS physically takes children from their parents and cases where they intervene to restrict a parent's legal access to their children. The Court, however, concludes that these distinctions don't make a difference.

Given that the Eighth Circuit has already held that removing the Plaintiffs from their mother, recommending placement with the Huffmans, and taking supervision of the children, is enough to bring this case within the ambit of *Norfleet* and not *DeShaney*, this Court would violate the law of the case to rule otherwise. The record shows that the state removed the children from their mother's legal custody and recommended placement with the Huffmans which prevented the mother from taking the Plaintiffs

from the Huffman home after the complaint of sexual abuse.

Furthermore, viewing the record in the light most favorable to the Plaintiffs, the Court concludes that while the Cole County Circuit Court had legal custody of the Plaintiffs, it effectively delegated its authority to DFS to provide day to day supervision. Furthermore, it was the responsibility of DFS to develop a factual record and make a recommendation so that the juvenile court could make an informed decision before assuming legal custody. The fact that DFS, much less these individual Defendants, lacked legal custody, does not negate the State's responsibility to affirmatively protect the Plaintiffs once they intervened in the Plaintiffs' lives and assumed the role of parens patriae.

While DFS did not technically remove the children from the mother's physical custody, DFS certainly did remove the children from their mother's control. For example, when the mother learned that Huffman was sexually abusing her daughter, she could not take the girls and protect them because DFS supervised both the children and their biological parents. (Pl. Ex. D, Heskett Dep. at 76.) In fact, the Huffmans and Richards got DFS to intervene specifically for the purpose of preventing the mother from coming back and taking her children. (Pl. Ex. C, Allen Dep. at 37, lines 2-21; Def. Ex. M, DFS Rec. at 814.) ("Both relatives felt they could provide adequate care for the children, but the court's jurisdiction would be necessary to protect them from Mrs. Burton picking her children up any time and withdrawing them from school again.") Under these circumstances, the technical, legal relationship between DFS and the Plaintiffs is a distinction without a meaningful difference. DFS had *de facto*

control over the day to day lives of the children. This is evident even from the fragmentary records that has [sic] been provided to the Court by the parties.

Defendants cite *Terry B. v. Gilkey*, 229 F.3d 680 (8th Cir. 2000), in support of their argument that they are entitled to summary judgment. That case is distinguishable. *Gilkey* involved minors who suffered physical, emotional, and sexual abuse after the state human services department placed them with their aunt and uncle. However, in a contested probate hearing, the aunt and uncle gained custody of the children. The Court found that the State exercised no restraint of the children's liberty after that day and, therefore, did not have a duty to protect the children. The Court also found that the DHS had neither exacerbated the environment at the aunt and uncle's home, nor caused custody to be given to the aunt and uncle, who themselves had petitioned directly for custody of the children.

2. Is There a Submissible Case on Plaintiffs' Constitutional Claim?

In addition to showing that Defendants had an affirmative duty to protect, the Plaintiff's must show that Defendants exhibited deliberate indifference to their safety. Having considered the record and arguments of the parties, the Court concludes that summary judgment should be granted in favor of Gaddie, Wilfong, Heskett, and Haslag, because there is insufficient evidence to support a deliberate indifference claim against them. However, it is denied as to Allen and Richmond because Plaintiffs have made a submissible case as to these Defendants.

The Court will examine the evidence as to each Defendant separately,[7] viewing the evidence in the light most favorable to the Plaintiff.

(a) Allen

Allen was assigned to the Burton case in early 1985. She, with Richmond, recommended that the Plaintiffs be made wards of the Court and be placed in the Huffman home. Prior to making that recommendation, she did not conduct a home study and did not do a criminal check. Had she done a criminal check, she would have learned of Huffman's conviction for first degree murder. In 1985, she received a report that Huffman was sexually abusing Amy but did not investigate even though she knew that she had not done an investigation prior to recommending that Amy be placed with the Huffmans. There is also evidence from which a reasonable jury could conclude that Amy was being sexually abused by Huffman at the time the complaint of sexual abuse was made and that the sexual abuse continued thereafter for years.

(b) Richmond

Richmond was the supervisor of the Burton case when they were placed with the Huffmans and remained the supervisor until they were removed in 1989. She knew everything about the case, including what was contained in the file and the work done by other social workers. She had direct contact with the Huffmans while the Plaintiffs

[7] Because the Plaintiffs have conceded there is insufficient evidence to show that Heskett was deliberately indifferent, the Court will not address the facts concerning Heskett.

were in their custody. She, along with Allen, recommended the Burton children be placed in the Huffman home even though she knew that neither a home study or a criminal check had been done in 1985, prior to their recommendation. Even after Shirley Burton notified Richmond that Amy was being sexually abused, and even though Richmond was aware that another report concerning sexual abuse had been received by Allen, Richmond did not investigate the Huffman home. Nor did Richmond investigate the Huffman home after learning that Huffman had been convicted of first degree murder and could not qualify as a licensed foster care home. She also knew that no home study was done in 1987 because Huffman did not want DFS to conduct a background check.

(c) Gaddie

Gaddie, a Warren County DFS worker, supervised the Burton children after their placement in the Huffman home. He did not conduct a home study and failed to visit the Huffman home for eight months after the placement. He was responsible for reviewing file materials provided by Cole County and he failed to investigate the reference to sexual abuse in the April 1985 report.

(d) Wilfong

Wilfong was assigned to the Burton case from October 1988 to November 1989. She was responsible for home visits to the Huffman home during that time. She made only two visits in a year. Home visits were expected at least once a month and typically twice a month. She was aware that Jim Huffman did not want DFS to conduct a background check, and, as early as July 1989, knew about

Huffman's criminal record but failed to further investigate.

(e) Haslag

Haslag was the Cole County DFS worker and was assigned to the Burton case between August 1989 and October 1989. She knew Huffman did not want his background checked and she knew of his criminal conviction in 1988 or early 1989. Although she was supervising the case, she did not note the 1985 entry in the file concerning sexual abuse.

Based on this record concerning these six Defendants, the Court finds that there is insufficient evidence to support a substantive due process claim against Gaddie, Wilfong, Haslag and Heskett. While each had varying degrees of culpability, these Defendants were at most negligent because there is insufficient evidence from which a jury could infer that any of them actually knew about a substantial risk of harm to the Plaintiffs and failed to take action to protect them.

The Court believes, however, that there is a submissible case against Allen and Richmond for deliberate indifference. In reaching that conclusion, the Court has relied on the *Norfleet* case. In *Norfleet*, it appears that a social worker was told that the dependent child needed medication, but the social worker failed to provide it and failed to supervise how the foster family handled the child's medical condition. The child died shortly after being removed and placed with the foster family. In this case, as to Defendant Allen, there is evidence that home studies are required for both relative and non-relative placements. No home study was completed by Allen who was the social

worker assigned to the Plaintiffs. Nonetheless, Allen made a recommendation to the Cole County Circuit Court that the Plaintiffs be placed with the Huffmans. Subsequently, Allen received a report that one of the Plaintiffs was being sexually abused. There is much more in the record that Allen should have known, but the "should have known standard" is not relevant in a deliberate indifference case. Even so, a reasonable juror could conclude that knowing that no home study had been completed, and knowing that one of the children had accused her step-grandfather of sexually abusing her, Allen was deliberately indifferent to Plaintiffs' substantial risk of harm when she chose not to investigate. *See Bailey v. Pacheco*, 108 F.Supp.2d 1214, 1231 (D. N.M. 2000) (motion for summary judgment denied when social worker failed to report allegation of sexual abuse or conduct an investigation). It is for a jury to decide whether Allen was subjectively aware of a risk to the Plaintiff's safety and deliberately failed to investigate. It is her lack of investigation that makes this case distinguishable from *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2002). In that case, where the Eighth Circuit found insufficient evidence to support a constitutional claim, the social worker, after receiving a complaint, did investigate.

The Court believes that the facts relevant to Allen are no less egregious than those present in *Norfleet*. In fact, a social worker has no medical skills which would permit him or her to appreciate the potentially deadly consequence of failing to provide a specific medication. Social workers, however, are trained to understand the particular vulnerability of children to sexual abuse, especially by a non-biological family member. A jury may conclude that Allen was not deliberately indifferent, but that is a question for a jury and not the Court.

As to Defendant Richmond, the case for deliberate indifference is even more compelling. She had been the caseworker for these children for some time and, as the supervisor of the Cole County Office, she was responsible for reviewing the Plaintiffs' file. Given her status as the caseworker, the supervisor[8] and someone who had direct contact with the Huffmans, a reasonable jury could conclude that she was aware that the children were placed in the Huffman home without a home study. It also appears that Allen and Richmond jointly recommended to the juvenile authorities that the Plaintiffs be placed in the Huffman home. (Pl. Ex. M, DFS Rec. at 221.) That document is written by Allen but refers to "we" and makes several references to Richmond. There is also evidence from which a reasonable jury could conclude that Richmond failed to investigate a complaint by Shirley Burton that Jim Huffman was sexually abusing one of the Plaintiffs. (Def. Ex. H, Harrison Dep.) Shirley Burton told Richmond that Amy said that "someone was hurting me down there." (Def. Ex. H., Harrison Dep.) She failed to make that investigation even though she was aware of another reference in the file to sexual abuse by Huffman. Furthermore, there is evidence that Richmond knew of Huffman's conviction for first degree murder and his hostility to having his home investigated for purposes of licensing even though licensing would result in more money. She also failed to investigate when it had been

[8] The Court is not suggesting that Richmond could be held liable for the misconduct of her subordinates pursuant to the doctrine of respondeat superior. Rather, given her duties as a supervisor, a juror could reasonably conclude that she had regular access to information in the file such as the report of sexual abuse made to Allen or the Huffmans' hostility to a DFS home study.

earlier alleged that the Plaintiffs' biological father had sexually abused Jennifer, evidencing deliberate indifference to complaints about sexual abuse. Thus, the Court denies Defendants' Motion for Summary judgment as it relates to Defendants Richmond and Allen but grants it as it relates to the remaining Defendants.

3. Would a Reasonable Social Worker Have Known That Their Conduct Violated a Clearly Established Constitutional Right?

The Eighth Circuit has already addressed this issue. Given the breadth of information that Richmond and Allen had about the Plaintiffs' situation, and their failure to act, the Court concludes that a reasonable social worker would have been on notice that their conduct violated a child's constitutional right to be protected from a known and substantial risk. While there is a difference between the facts alleged in Plaintiffs' complaint and those facts which are now supported by the record, most of the discrepancy relates to Plaintiffs' procedural due process claim and not Defendants' substantive due process claim.

IV. Conclusion

Accordingly, for the reasons stated above, it is hereby

ORDERED that Defendants' Motion for Summary Judgment [Doc. # 72] is GRANTED as to Defendants Gaddie, Wilfong, Haslag and Heskett but DENIED as to Defendants Richmond and Allen.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: April 28, 2003
Jefferson City, Missouri

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2487

Heather Burton; Amy Burton; Thomas Burton; Jenny Brandt; Michelle Balikes; John Burton,	*	
Plaintiffs-Appellees,	*	
v.	*	
Patricia Richmond,	*	
Defendant-Appellant,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Jeanie Heskett,	*	
Defendant,	*	
Mary Ann Barnes, formerly known as Mary Ann Allen,	*	
Defendant-Appellant,	*	
Susan Wilfong; David Gaddie; Leann Haslag,	*	
Defendant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

August 2, 2004

Order Entered at the Direction of the Court:
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit